

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

677 Broadway - 9th Floor, Albany, New York 12207-2996 Tel: (518) 449-8893 Fax: (518) 449-8927

Albany • Baltimore • Boston • Chicago • Dallas • Garden City • Houston • Las Vegas • London • Los Angeles • McLean
Miami • Newark • New York • Orlando • Philadelphia • San Diego • San Francisco • Stamford • Washington, DC • White Plains
Affiliates: Berlin • Cologne • Frankfurt • Munich • Paris

www.wilsonelser.com

MEMORANDUM IN OPPOSITION

March 1, 2011

A. 629 Weinstein (On Assembly Third Reading Calendar No. 46) S.697 Klein (Senate Housing Committee)

AN ACT to amend the real property actions and proceedings law, in relation to standing to commence an action to foreclose a mortgage

This memorandum in *opposition* is written on behalf of our client, the New York Bankers Association (NYBA). NYBA is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State. In aggregate, members of the Association employ approximately 200,000 New Yorkers and hold more than \$9 trillion in assets.

The New York Bankers Association (NYBA) opposes this legislation that would create new and unnecessary obstacles for legitimate plaintiffs in New York foreclosure proceedings.

A.629/S.697, among other things, would require an affirmative allegation in every summons and complaint to commence a foreclosure action that at the time the proceeding is commenced, the plaintiff is the owner and holder of the subject mortgage and note or has been delegated the authority to institute the action by the owner and holder of the subject mortgage and note, and would require the plaintiff to plead in its complaint that the originals of the subject mortgage and note are in its possession and control. The bill would also allow a defendant to raise a defense based on the plaintiff's lack of standing in a foreclosure proceeding at any time in the action. This legislation would create additional unnecessary barriers to the mortgage foreclosure process, and would encourage defendants to withhold raising the issue of standing until the end of the foreclosure process, thereby extending, perhaps by years, the nation's already longest foreclosure process.

The obligations set forth in A.629/S.697 are, to a large extent, already addressed in mortgage foreclosure legislation signed by Governor Paterson on December 15, 2009 (Chapter 507 of the Laws of 2009). That law specifically requires the parties in mortgage foreclosure actions to bring prescribed documents to the settlement conference, including "the mortgage and note." Moreover, the requirement in A.629/S.697 that the original mortgage and note be in the plaintiff's possession and control is not reflective of the reality that mortgages are recorded documents and thus maintaining the original in a lender's possession is not necessary. As a result, originals are, in fact, not routinely kept by many lenders at this point in time, making this requirement in A.629/S.697 potentially unachievable for many plaintiffs. Indeed, this requirement would appear to leave no mechanism to exercise a plaintiff's valid legal right to foreclose on a property, if only a copy of the mortgage and note are available – no matter what the cause for the

original's not being available (even if the lack of availability is due to fire or other natural disaster)

The new requirements set forth in A.629/S.697, if enacted into law, would create even more obstacles in the New York foreclosure process, which already is the longest in the nation, averaging more than 400 days in many places. These additional delays will unfairly prevent plaintiffs from exercising their legal rights, and importantly, will only serve to increase the borrower's financial obligations, while likely resulting in further deterioration of the property and surrounding neighborhood. These consequences will likely be further exacerbated by the fact that A.629/S.697 would allow the defendant to raise a defense based on the plaintiff's lack of standing in a foreclosure proceeding at any time in the action – no matter how far along.

For all these reasons, we *oppose* this legislation and urge that it be held.

Respectfully Submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP